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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

DOCKET FILE COPY ORIGINAL

IN THE MATTER OF:	)	**GC Docket No. 92-52**
	)	
Reexamination of the Policy	)	**RM-7739**
Statement on Comparative	)	**RM-7740**
Broadcast Hearings	)	**RM-7741**
	)	

To: The Commission

COMMENTS OF HIGHLANDS BROADCASTING CO., INC.

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July 22, 1994

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SUMMARY

Highlands Broadcasting Co., Inc. ("Highlands") submits its Comments in response to the Commission's *Second Further Notice of Proposed Rulemaking*, and suggests that, in the event the Commission adopts new criteria, that it adopt only such criteria as can be verified and documented, and so objectively and precisely implemented by Commission staff.

Highlands suggests that the Commission retain, as separate factors for consideration in selection criteria, a minority preference credit. However, Highlands, recommends that the Commission elevate the standard in order to ensure against abuse, and to ensure that minorities have substantive control in the governance of their facilities. Additionally, Highlands requests that the Commission clarify the standards of proof to be considered in connection with claims of minority status, since such standards have been inconsistently developed and applied in past cases. A more precise standard of proof and documentation should be required, to ensure that minority credit be awarded to deserving parties.

Retention of the local residence/civic participation credit in any form is unnecessary, and consideration of this factor is irrelevant to public service considerations. Addition of the proposed program service credit would be require too much subjectivity for precise implementation, and would not serve to delineate the best qualified applicant. Enforcement of a proposed service continuity credit is impractical, and the executory nature of the preference renders it difficult of objective, verifiable proof. None of these factors should be used as selection criteria.

Highlands supports the use of a Finders' Preference credit, since petitioners for allocation of new facilities expend considerable time, effort and expense in such allocations. The Daytimers' Preference Credit should also be retained as a

factor, in modified form. The Commission should modify this preference, to reduce or eliminate the holding period required to obtain the preference, and to allow Daytimers who are awarded FM station permits to retain ownership of their Daytimer facilities. This result would be more consistent with promoting efficient and economic broadcast service in the public interest. Both the Finders' and Daytimers' preference are objective and verifiable criteria.

Highlands would support use of random selection as the only fair means of selection among otherwise-equally situated applicants.

As a matter of fairness to applicants who have already prosecuted their applications before the Commission, Highlands supports a proposal that would allow limited amendments by such pending applicants to bring their cases into line with new Commission requirements regarding proof of prior claims and proof of previously-existing facts which may now qualify for credit.

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To: The Commission

COMMENTS OF HIGHLANDS BROADCASTING CO., INC.

Highlands Broadcasting Co., Inc., ("Highlands") by Counsel, respectfully submits its Comments in response to the *Second Further Notice of Proposed Rulemaking* in the above-captioned Docket Proceeding, and requests that the Commission adopt its suggestions, as set forth below.

STATEMENT OF INTEREST

Highlands is a competing applicant in MM Docket No. 90-48 for a new FM Station at Carmel, California. That proceeding was on Appeal to the U.S. Court of Appeals for the District of Columbia Circuit, and was reversed and remanded to the Commission on May 16, 1994 for reconsideration in light of the Court's prior decision in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).[1] The case was referred by the Commission to a settlement judge, and an informal settlement conference was held on July 1, 1994. To date, the parties have been unsuccessful in reaching settlement of the case, and it appears that the pending applications may be subject to any new comparative selection process arrived at by the Commission in the instant proceeding. Accordingly, Highlands is keenly interested in the Commission's reformation of its selection criteria, especially as

[1] A copy of these Comments are being served on the other parties to MM Docket 90-48, as required under §1.1208.

it may apply to Highlands' pending case.[2]

COMMENTS

1. *Point System Should Be Based on Objective, Verifiable Factors.*

Highlands supports the Commission's proposal for a selection standard based on objective, easily identified criteria rationally related to selection of a qualified licensee through use of a point system. To the extent that certain of the enhancement criteria applicable under the Commission's former integration criteria were assessed qualitatively, rather than quantitatively, the use of those criteria contributed to the ambiguous nature of the selection process, and to inconsistent and uncertain results and case law. However, the Commission's proposal to use a point system to evaluate the criteria would provide a more objective basis for evaluation of criteria provided that the criteria were sufficiently well-defined and that applicant's claims for the criteria were documented in their applications or in subsequent filings. Use of a point system should require not only that each criterion be clearly identified and weighted in relation to its logical relevance to an applicant's potential for successful construction and operation of the proposed facility, but also that any claim for credit under each criterion be documented with *specific* supporting data that is susceptible of easy confirmation and proof.[3]

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[2]Highlands also has pending with the Commission a Petition for Extraordinary Relief requesting appointment of an independent interim operator for the new FM Station in Carmel, which has been constructed and placed in operation by the grantee, at its own risk.

[3]For example, should the Commission ultimately determine that broadcast experience is a factor that should weigh in favor of an applicant's qualifications to hold a license, the Commission should, in addition to defining the points available for such a credit, define the minimum amount of experience and the exact positions that would qualify for credit. The Commission should require the applicant to demonstrate eligibility for the credit, at such time as the claim is asserted, by submission of specific non-subjective and verifiable documentation, such as employment records, tax information, and certifications from prior employers proving the applicant's experience for the time period claimed. Self-serving testimony, or declarations by applicants describing their past broadcast experience, without additional, verifying objective proof, should not be permitted.

2. *Eligibility Standard for Minority Preferences Should Be Raised.*

The Commission does not propose elimination of diminution of the minority preferences presently utilized for qualitative preference in comparative proceedings.[4] However, the standard for claims for minority preferences should be more strictly defined in order to provide a more objective basis for award of such a preference, and to prevent abuse. In its *Second Report and Order on Implementation of Section 309(j) of the Communications Act - Competitive Bidding,* FCC 94-61 (Released April 20, 1994) the Commission elected a strict eligibility criterion for proof of minority and female ownership and control, in order to prevent abuse of the preference system. The Commission defined "Designated Entities" that are eligible for preferential treatment through bidding credits, tax certificates, installment payments in § 1.2110 of its new Rules. Businesses owned by minorities are defined as businesses in which minorities have at least 50.1% equity ownership and 50.1% controlling interest in the applicant. Furthermore, the interests of minorities are to be calculated on a fully-diluted basis, with stock options, convertible debentures and other executory interests treated as if they had been fully exercised.[5]

Highlands suggests that a similar standard be applied in comparative broadcast cases; a more precise standard would be less susceptible to abuse, but would ensure that minority owned and controlled entities are provided with communications opportunities.[6]

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[4]*See Second Further Notice of Proposed Rule Making,* at fn. 3.

[5]Female-owned businesses are similarly defined.

[6]Use of a stricter standard would go a long way to eliminate the *Anax* problem of use of two-tier applicants where control by the minority or female principal(s) is questionable. Use of *bona fide* two-tier entity arrangements with passive investors whose shares constitute a minority interest would retain their raison d'être as a viable funding mechanism to provide financing for minority-controlled entities who historically have greater difficulty in obtaining conventional funding.

3. *Standards of Proof for Minority Status Should Be Clearly Defined.*

As with other preference claims, applicants should be required to fully document their minority status. Claims for minority preferences have been disparately treated over the years, and varying standards of proof for minority status have obtained in a number of cases. The result is that the underlying standards for claims of minority status are now inconsistent, and unclear. For example, persons claiming minority status as African Americans or Asian Americans who *look* Black or Asian are not required to prove what percentage of their heritage derives from Black or Asian forbears. American Indians, Aleuts and American Eskimos are required to demonstrate their cultural and tribal affiliations, in addition to documenting their heritage as American Indians through birth or government records.[7] Hispanics are defined as persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race,[8] with no requirement of proof based on appearance, documented heritage, or surname. Nevertheless, the Commission has applied a "blood" test to determine percentage of heritage for Hispanics,[9] which is not applicable in other minority contexts, even to Native Americans,[10] and for which no statutory authority whatsoever exists.[11] This inconsistent application of racially

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[7]*See Jarad Broadcasting Co., Inc.*, 61 RR 2d 389, 399 (1986).

[8]*See* Instruction No. 6 to FCC Form 395-B, March, 1994 edition; *see also* OMB Statistical Policy Directive No. 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting."

[9]Compare *Lone Cypress Radio Associates, Inc.*, 71 RR 2d 302 (Rev. Bd. 1992) recon. denied, (1993) with *Hispanic Keys Broadcasting Corp.*, 64 RR 2d 1625 (Rev. Bd. 1988).

[10]*See Jarad Broadcasting Co., Inc.*, 61 RR 2d 389 (Rev. Bd. 1986).

[11]Nevertheless, in the Carmel FM proceeding, Highlands was faulted for not initially offering documentary "proof" of Mr. Wisdom's Hispanic heritage; Highlands was denied minority credit, notwithstanding Highlands' subsequent offer of proof of minority status. Given the unclear standard for proof of Hispanic status prior to the outcome of this proceeding, the Commission adverted to a cultural/affiliation standard of proof, in this case, similar to that applied for American Indians, but made no general ruling on the standard of proof that should apply for Hispanics henceforth. The Commission's case law now contains

discriminatory criteria obviously raises significant constitutional questions.

Assuming that the Commission elects a point system, which would lend itself to paper proceedings, rather than to trial-type hearings where principals and other witnesses appear to testify, some more objective *and consistent* method of determining an applicant's entitlement to minority status must be identified. At the very least, minimum standards of racial or ethnic purity should be identified,[12] and standards of proof must be clarified for purposes of claims of minority status. Specific documentation through birth records, official records, or third-party proof of minority heritage or cultural affiliation should be required of *all* minority claimants, regardless of how obviously they may "look" the part. It is fundamentally discriminatory and a denial of equal protection of the laws in violation of the Equal Protection Clause of the Constitution to require different standards of proof dependent on the type of minority status claimed; differing standards are also difficult to administer, and to the extent that claims are disposed of in paper proceedings, offer substantial potential for abuse, and for administrative confusion and error.

4. Local Residence/Civic Participation Credit.

Since integration of ownership into management has been declared unlawful by the U.S. Court of Appeals in *Bechtel v. FCC, supra*, it makes little sense for the Commission to retain local residence and/or civic participation as a separate preference criterion. While there may have been some public interest

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a variety of inconsistent standards for proof of Hispanic heritage, including proof of birth, obvious evidence of a Spanish surname, visual evidence of Hispanic heritage (dark skin, and hair, brown eyes) and now, cultural affiliation, none of which are required under the definition in governmental statistical policy directives. It is clear that Highlands is the victim of a "Catch-22" situation: it did not initially offer documentary proof because the standard did not require it, and was later procedurally precluded from offering such proof of its claim.

[12]That is, what minimum percentage of African American, Asian American, Hispanic, American Indian, American Eskimo and Aleut, Mexican, Puerto Rican, Cuban, Central or South American heritage or origins as identified on a principal's birth records would qualify for eligibility for minority status.

benefit in encouraging owner/managers to be locally resident and civically active in the community to ensure familiarity with community interests, there is no such rationale available to provide a basis for a preference for local residence or civic participation for owners not involved in management at the station. Given the degree of professionalism in the broadcasting industry, and the amount of information available regarding community demographics from a variety of sources, there is little reason to suppose that familiarity with a community as a resident would improve service to that community, and little reason to reestablish the local residence/civic participation factor as a preference for an applicant.

Furthermore, as has been demonstrated in numerous comparative hearing cases, application of such a preference cannot be accomplished in precise quantitative terms. Residence and participation have "quality" built-in as part of the analysis: certain types of residence and certain kinds of civic participation may be more valuable than others, and it would not be possible, in advance, to define all the possible permutations for preference criteria purposes. Such a preference would be too ambiguous and too difficult to administer as part of a point system; and as noted above, there would be little purpose to establishing such a factor as a separate preference.

5. Proposed Program Service Credit.

Highlands does not support the proposed new criteria of a demonstration of proposed program service. Preferences based on such demonstrations skirt First Amendment problems militating against content regulation, which the Commission and the Supreme Court have previously recognized.[13] The Commission plainly stated the difficulties of objectively evaluating the strength

[13]*Policy Statement, In re Changes in Entertainment Formats of Broadcast Stations*, 60 FCC 2d 858, 37 RR 2d, 1679 (1976), *recon. denied*, 66 FCC 2d 78, 41 RR 2d 453 (1977). *See also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 49 RR 2d 271 (1981).

of listener preferences.[14] Nor would preference claims based on such demonstrations serve as an adequate basis to delineate among applicants; it is easy enough to conduct ascertainment and market research to support such a claim, and all new applicants would simply expend the effort and monies to conduct such ascertainment as a matter of course, in order to claim the credit. To the extent that any such ascertainment is based on prior broadcast service to the community, such a preference would also tend to favor applicants with prior or existing interests in broadcast service in the community. Finally, such a preference would require a subjective judgment as to the "quality" of a proposed program service. Preferences based on such service may be better addressed through a more objective demonstration of prior service, such as a daytimer preference, or through a broadcast experience preference, where the "quality" of service, necessarily an ambiguous factor susceptible to subjective judgment, is not a factor for consideration.[15]

6. Proposed Service Continuity Credit.

Similarly, Highlands does not support the Commission's proposal to include a new criterion of service continuity as part of the selection criteria. Like integration proposals, such a criterion is executory in nature, easy to pledge, and difficult to enforce. The Commission has never successfully enforced performance of integration pledges, one of the factors criticized by the Court in *Bechtel v. FCC, supra.* There is little reason to think that the Commission could strictly enforce service continuity pledges, even assuming it had the resources to do so, especially given the lack of enforcement of integration pledges, and past enforcement of the trafficking rules, where waivers for cause were routinely

[14]Policy Statement, 60 FCC 2d at 862-864.

[15]Highlands recognizes that it may be desirable to permit a challenge of such a preference where the challenger could show that an applicant's controlling principal had a documented bad broadcast record of willful and repeated violations of the Commission's Rules.

permitted.

7. Finders' Preference Credit.

Highlands strongly supports addition of a Finder's Preference as a selection criteria. Persons contemplating applying for new broadcast allocations spend much time, effort and expense in determining whether an allocation is feasible, and in processing the new allocation through the FCC's bureaucratic procedures.[16] This effort is closely akin to the efforts expended by firms in developing new technologies which ultimately result in new services, which the Commission rewards with dispositive preferences for new licenses through its Pioneer's Preference programs. While such allocation proceedings do not ordinarily propose new technology, they often propose new and needed community service; the additional effort undertaken by a competing applicant in obtaining an allocation of a new frequency is not only itself a public service which is not presently recognized, it is fundamental to the free enterprise system. Such applicants put at risk the first capital in providing service to the public, and such actions result in significant public benefit. Such entrepreneurial effort denotes a higher than usual interest in providing service, and is easily documentable, and recognizable. Applicants who have so demonstrated *ab initio* their interest in serving the public, and who have expended capital and time in obtaining allocation of a frequency for which they subsequently become applicants should therefore be afforded the recognition they so highly deserve, through award of a significant, or even a dispositive Finders' Preference, in the selection process.

8. Daytimers' Preference Credit.

Highlands enthusiastically supports continued use of the Daytimer

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[16]Even simple allocation requests typically remain pending with the Commission for 18 months or more; complicated allocation proceedings with objections and counterproposals may take much longer.

Preference as a means of alleviating the economic burdens borne by owners of Daytime AM stations. The standards for qualification for a Daytimer Preference are already established, and are quite specific, and may readily be documented. They may be disassociated from integration considerations, and may be independently considered as a criterion for selection.

However, Highlands recommends certain modification of the Daytimer Preference. First, the preference should be modified to allow continued operation of the AM Station in combination with the new FM Station, if awarded to the Daytimer. The diversity considerations which existed at the time the Daytimer Preference was established have changed, pursuant to the Commission's reconsideration of its multiple ownership rules. Such operation now would be fully consistent with the Commission's relaxation of its multiple ownership rules and the rationale which underlies the Commission's current duopoly rule: given that most markets are well supplied with broadcast services, market economics favor the more efficient operational characteristics of a combination operation. Such AM/FM combination operations often promote better programming and service to the community of license. It is simply unnecessary to require divestiture of the AM Station in most instances, except where otherwise required by the Commission's multiple ownership rules. Additionally, divestiture of a Daytime AM station as a stand-alone facility often requires that the successful applicant sustain a loss on the sale, whereas operation of both the AM/FM, or subsequent sale of both stations together, would not require the same financial sacrifice. Most important, the divestiture requirement simply shifts the economic plight of the Daytimer applicant to a new party, one for whom no relief would be available. The public policy reasons behind the Daytimer Preference - relief for Daytime AM Station owners - are thus thwarted.

Highlands also recommends that the Commission substantially relax or

even eliminate the holding period required for ownership of a Daytime AM Station prior to the date of the FM application for qualification for a Daytimer Preference. In the original proceeding which established the preference,[17] the eligibility criteria developed by the Commission were intended to assure that an applicant would operate the FM Station in the public interest.[18] The FCC's rationale for granting the preference in the first place were premised only upon the limitations of operation imposed on Daytimers, and recognition of the public service offered by such broadcasters.[19] Acquisition of a Daytime AM Station in a given community, even if an application for an FM station is imminent, or allocation of an FM frequency is pending, is a significant step in broadcast service to that community by an applicant and should be recognized as such. Indeed, there is little rationale for any holding period for a Daytime AM Station prior to the date of application for an FM station; investment in broadcast service to the community is evident, regardless of when the opportunity for ownership occurred. The existing three-year holding period was arbitrarily selected, with no rationale as to why that particular time period was relevant; provided that ownership of the Daytime AM station continues throughout the lengthy processing and selection period connected with selection among mutually exclusive applicants, there is little reason to require that a broadcaster have owned the facility for three years prior to the date of the FM application.

Additionally, Highlands requests that the Commission relax its requirement that the Daytimer preference be awarded only to the Daytimer Licensee entity

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[17] *FM Channel Assignments (Increased Availability)*, 1010 FCC 2d, 638, 57 RR 2d 1607 (1985), *recon. denied in part*, 59 RR 2d 1221 (1986).

[18] *Id.*, 59 RR 2d at 1228.

[19] *Id.*, 57 RR 2d at 1612.

which applies for the FM permit.[20] The preference should also be available to any principal who is able to demonstrate that he controls both entities in terms of equity and voting interests.[21] Eligibility for the preference in FM proceedings is defined in terms of management (integration) involvement in the Daytimer Licensee. However, assuming that the Commission is no longer able to characterize the Daytimer preference as an enhancement credit under the integration criterion, or to consider whether principals of a daytimer licensee were integrated into the management of the daytimer as part of the eligibility criterion, it would be easier and more sensible to administer the preference through a determination of *de jure* and *de facto* control, since these factors could be readily and objectively determined. With the elimination of the integration factor, there is no need to consider claims of applicant/principals with minority interests who have been involved as managers of the Daytimer stations, and if only controlling principals are able to claim the preference, there would be no difficulty with competing claims of minority interest holders of a Daytimer Licensee who separately apply for the FM permit. Relaxation of the standard in this fashion would promote the Commission's original goal in fashioning the daytimer preference by recognizing that the benefit (and the relief) may be claimed by principals who are at greatest risk in operating the Daytimer station.

9. Tie Breaker Mechanisms.

Highlands recognizes that in some cases, a tie-breaker mechanism would be necessary. Highlands does not support use of the first-filed application proposal, or the use of substantial prior broadcast experience as tie-breaker

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[20]*Id.*, 59 RR 2d at 1229.

[21]For example, if a shareholder owns more than 50% of the equity and more than 50% of the voting interests in a Daytimer licensee entity, and also controls more than 50% of the equity and more than 50% of the voting interests in a separate applicant entity, the preference should be available to the applicant, as well as to the Licensee entity.

mechanisms. The first-filed application mechanism would simply generate a "race to the Courthouse" for purposes of application, and it would be difficult, if not impossible, to select among applicants on this basis, since most applicants would apply on the first available day of a filing window to take advantage of such a criterion.

The use of substantial broadcast experience would, indeed, disadvantage minorities in the selection process; given the continuing disparity of minorities in the communications industry and in broadcasting in particular, and the lack of opportunity most minorities have had in ownership and operation of communications facilities, it would be the rare occasion when a minority applicant would have sufficient prior broadcast experience, in terms of longevity, to prevail on this criterion.

On the other hand, the Commission's proposal for a random selection, if properly weighted to take congressionally-mandated factors into consideration, would be a fair and completely objective means of selection among equally-qualified applicants.

10. Opportunity to Amend.

The Commission indicated, in its *Second Further Notice*, the particular problems attending application of any new selection criteria to applicants who have been through the Commission's hearing process under the old comparative criteria. Certain fairness considerations militate against wholesale application of new criteria to such applicants, even assuming applicants are given the opportunity to amend; in the event of substantial reformation of an applicant to meet new criteria, issues may be raised by competing applicants regarding the original *bona fides* of an applicant organization, and in some cases, additional hearings would be required. Such additional hearings would pose substantial financial burdens on applicants such as Highlands, whose cases have been

appealed through the Commission's multiple appellate levels, to the Circuit Court of Appeals. If new selection criteria are applied to such applicants, only limited reformation of applications should be permitted, in order to promote more expeditious selection among competing applicants without further hearing. Applicants should not be permitted to amend their structural organizations, abut should be allowed to meet the underlying standards of proof that would otherwise be required (i.e., to allow an applicant to provide copies of partnership agreements, articles of incorporation and by-laws, if such have not previously been provided). Claims for minority credit,[22] daytimer preferences, finders' preferences, broadcast experience, and such other credits as may be established by the Commission should be permitted to be asserted or reasserted, with appropriate documentation as proof, if such documentation was not previously provided to the Commission as part of the hearing process. Applicants may then be fairly reevaluated under the point system, and a selection made by the Commission.

CONCLUSION

In summary, Highlands supports the use of the Commission's proposed point system for selection of broadcast licensees from among all new mutually exclusive applicants for broadcast facilities. The system should be premised on full documentation of all factors considered under the system, in order to minimize the need for hearings, and the time for selection. Use of Finders' Preferences, Daytimers' Preferences, and Minority Preferences, modified and clarified as suggested herein, would contribute to an objective evaluation of applicants, and would promote selection of the most interested and best qualified

[22]Given the prior inconsistency and uncertain in the standards of proof for minority status, and assuming that the Commission clarifies these standards, considerations of due process and equal protection mandate the opportunity for applicants to revisit this criterion as necessary, to provide full documentation of claims previously made and disallowed.

applicants. Elimination of all factors that require qualitative, rather than quantitative evaluation would promote selection on an objective and consistent basis, and establishing definitive criteria would promote the Commission's ability to select among mutually exclusive applicants in a manner consistent with the public interest in enthusiastic, attentive and informed broadcast service to the community for which the license is awarded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon L. Hinderer, Secretary in the Law Firm of **Putbrese & Hunsaker**, hereby certify that I have on this 22nd day of July, 1994, sent, by United States Mail, Postage prepaid, copies of the foregoing, **"Comments of Highlands Broadcasting, Co., Inc."** to the following:

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